courts are unwilling to permit a person in a judicial position to be subjected to cross-examination as if he were a party to the proceedings.

That decision is of course based on the principle that the subordinate authority should not be made a party to the proceeding.

In *Squibb United Kingdom Staff Association* v *Certification Officer*[7] a similar application to cross-examine the certification officer in respect of his refusal to grant a certificate that an association was not an independent trade union under the UK Trade Union and Labour Relations Act 1974. What Lord Denning MR said at p 457 is quite relevant to get our perspective right in the present appeal:

> No doubt on any appeal there is a public interest involved. *So there should be someone present to support the decision of the certification officer.* In a criminal case the public interest is represented by the Crown. In one of these cases I think the public interest should be safeguarded by the Treasury Solicitor. The regulations provide that any party can be added such as the appeal tribunal thinks right. The Treasury Solicitor should be made a party and instruct counsel, not to represent the certification officer, but to represent the public interest. He should call any evidence which he thinks will be of assistance to the appeal tribunal and put forward any submissions which he thinks proper to be considered.
>
> It seems to me, therefore, that in future, instead of the Treasury Solicitor coming on behalf of the certification officer, he should come almost as a friend of the appeal tribunal to look into the facts and bring all material matters before the appeal tribunal. I do not suggest that the certification officer can never be called as a witness. He might be called, or his investigating officers might be called, so as to show what enquiries he made and what information he had before him; and he should produce any of the material which he considered. *But I do not think he should be regarded as an opposing party to be cross-examined on the validity of his reasons.* (Emphasis added.)

Finally s 103 of the LPA is a statutory provision for appeal. The appeal can be against the decision of the State Bar Committee *or* the Inquiry Committee or the Bar Council. But in every one of these appeals the Bar Council is required to be served with the documents. Section 103(3) requires only a literal reading and it is against all canons of construction to suggest that the subsection imposes a further requirement that the Bar Council be also made a party.

There is no doubt therefore that the action in the present case is properly constituted and non-citing of the Bar Council does not affect the validity of the action. The appeal on the first issue is accordingly allowed.

As regards the question of expiry of the period of appeal we agree with the conclusion of the learned judge that under s 103(1) of the LPA a complainant has 14 days from the date of receipt of the Bar Council's decision within which to appeal if he is dissatisfied with the decision. But there is no provision in the LPA for the court to enlarge time for this purpose. Since the time limited for appealing has long since expired, the appeal was not properly before the court. The appeal against the second issue is dismissed.

Since we have allowed the appeal on the first issue raised in the preliminary objection but dismissed the appeal on the second issue, we will not make any order as to costs in the appeal. Deposit to be returned to appellant.

Order accordingly.

Solicitors: *Meena Thayalan & Partners*; *Ong & Manecksha*; *VP Nathan & Partners*; *Sri Ram & Co.*

Reported by *Prof Ahmad Ibrahim*

Gapari bin Kitingan v Attorney General, Malaysia

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 01-52 OF 1990
ABDUL HAMID OMAR LP, AJAIB SINGH AND JEMURI SERJAN SCJJ
14 NOVEMBER 1990

Criminal Procedure — Letter of request for depositions to be taken outside jurisdiction for purposes of criminal proceedings in Malaysia — Applicability of Rules of High Court 1980 to criminal proceedings — Rules of the High Court 1980, O 39 — Courts of Judicature Act 1964, ss 3 & 16

Words and phrases — 'Cause' — Courts of Judicature Act 1964, s 3

This was an appeal from the decision of the High Court dismissing the appellant's application to set aside the ex parte order granting the application by the Attorney General of Malaysia for depositions of certain persons named in the application to be obtained in Hongkong and further order for the issue of a letter of request to be directed to the Supreme Court of Hongkong to request that court to take or cause to be taken the depositions of the said persons for the purpose of criminal proceedings in Malaysia.

Held, dismissing the appeal:

(1) By reason of s 16(a) of the Courts of Judicature Act 1964, the word 'cause' must necessarily be applicable to the rules of court made under the section. As 'cause' is defined in s 3 of the Act to include 'any criminal proceeding' the same meaning must be assigned to the word 'cause' in O 39 of the Rules of the High Court 1980. So viewed, O 39 should be applicable not only in respect of civil but also of criminal proceedings.

(2) Considered in the light of s 16(a) of the Courts of Judicature Act 1964, O 39 of the Rules of the High Court 1980 is therefore valid and properly enacted and the order is applicable to both civil and criminal proceedings. The learned judge had therefore not erred in law in making the order which he did and had acted intra vires.

[Bahasa Malaysia summary

Ini adalah rayuan dari keputusan Mahkamah Tinggi dan yang menolak permohonan perayu menepikan perintah ex parte yang membenarkan permohonan Peguam Negara supaya deposisi beberapa orang yang disebutkan didalam permohonan itu diambil di Hongkong dan selanjutnya mengeluarkan surat permintaan kepada Mahkamah Agung Hongkong meminta mahkamah itu mengambil atau mengarahkan diambil deposisi orang-orang itu untuk digunakan bagi prosiding jenayah di Malaysia.

Diputuskan, menolak rayuan itu:

(1) Disebabkan s 16(a) Akta Mahkamah Kehakiman 1964, perkataan 'guaman' semestinya digunakan kepada kaedah-kaedah mahkamah yang dibuat dibawah seksyen itu. Oleh kerana perkataan 'guaman' itu ditakrifkan di s 3 Akta itu termasuk 'mana-mana prosiding jenayah' makna yang sama hendaklah diberi kepada perkataan 'guaman' didalam A 39 Kaedah-kaedah Mahkamah Tinggi 1980. Atas pandangan itu A 39 boleh digunakan bukan sahaja bagi prosiding sivil akan tetapi juga bagi prosiding jenayah.

(2) Dipandang dari peruntukan s 16(a) Akta Mahkamah Kehakiman 1964, A 39 Kaedah-Kaedah Mahkamah Tinggi 1980 adalah sah dan diperbuat dengan wajar dan perintah itu boleh dikenakan kepada prosiding-prosiding sivil dan jenayah. Hakim yang arif oleh kerana itu tidak tersilap dari segi undang-undang apabila beliau membuat perintah yang dibuat oleh beliau dan beliau telah bertindak didalam bidangkuasanya (intra vires).]

Cases referred to

1 *Dato Mohamed Hashim Shamsuddin* v *AG* [1986] 2 MLJ 112 (folld)

Legislation referred to

Courts of Judicature Act 1964 s 16(1)
Rules of the High Court 1980 O 39

Appeal from: Originating Summons No K18 of 1990 (High Court, Kota Kinabalu)

Ronald Khoo Teng Swee (*Simon Shim* and *Harjeet Singh* with him) for the appellant.

Abdul Ghani Patail (Senior Federal Counsel) (*Ng Aik Guan* (DPP) with him) for the respondent.

Cur Adv Vult

Abdul Hamid Omar LP (delivering the judgment of the court): This is an appeal against the decision of Haidar J sitting at Kota Kinabalu dismissing the appellant's application to set aside the ex parte order given by Mohd Noor J on 19 March 1990 granting the application by the Attorney General, Malaysia for depositions of certain persons named in the application be obtained in Hong Kong, and further order for the issue of a letter of request to be directed to the Supreme Court of Hong Kong to request that court to take or cause to be taken the depositions of the said persons for the purposes of criminal proceedings instituted in Malaysia. There was yet a further order which we think need not for purposes of this appeal be set out herein.

The learned judge who heard the application to set aside the order briefly adverted to the events leading to the application made by the Attorney General, Malaysia before referring to the main thrust of the argument made by Mr Ronald Khoo Teng Swee, senior counsel for the appellant, that O 39 of the Rules of the High Court 1980 ('RHC') does not apply to criminal proceedings.

The argument canvassed before us in this appeal directly revolves on one central issue, namely, that O 39 RHC does not apply to criminal proceedings. It is the appellant's main contention that the learned judge was clearly wrong to rely as authority to support his decision the judgment of this court in the case of *Dato Mohamed Hashim Shamsuddin* v *AG Hong Kong*[1] as reflected in the majority decision.

The judgment in *Dato Hashim*'s case[1] turned essentially on O 66 RHC, its validity and the propriety of its enactment. The court came to a decision that s 16(1) of the Courts of Judicature Act 1964 ('the Act') is the statutory source and the enabling provision for O 66 and that it is valid and properly enacted in relation to both the civil and criminal proceedings; hence the decision made pursuant to that order was intra vires.

In *Dato Hashim*'s case[1] the court concluded that the RHC constituted a subsidiary legislation and that the phrase 'in relation to a matter' in r 1(1) of O 66 connotes the application of that order to criminal as well as civil matters on the basis that although the word 'matter' is not defined in the RHC, the RHC itself was enacted under the Act.

That court arrived at the conclusion after considering the definition of the word 'matter' read with that of 'proceeding' in s 3 of the Act which the court says clearly includes criminal proceedings and is applicable equally to the provisions of the RHC by virtue of s 21(1) of the Interpretation Act 1967.

In its judgment the court also considered the effect of O 1 r 2(2) and (3), in particular the effect of para (3) of r 2 before it turned to consider the question of the statutory source or enabling provision for the enactment of O 66. Special reference was given to s 16 of the Act which the court held to be the statutory source and enabling provision for O 66.

In our view, the situation obtaining in that case is not substantially distinguishable from that obtaining in the instant case. While in that case the court was construing the scope and effect of O 66, here we are concerned with O 39. It is our view that though they are separate orders both are nevertheless provisions of the same RHC, a subsidiary legislation which emanates from the same source. We are therefore unable to see why the judgment in that case insofar as it concerns the

source of the RHC, the propriety of the enactment of O 66 and the effect of O 1 r 2(2) and (3) RHC, cannot be relied on by the learned judge as applicable to this case when interpreting the scope and effect of O 39.

The question that calls for determination here is whether s 16 of the Act, in particular para (a) of that section can be construed to constitute the source and enabling provision empowering the enactment of O 39, and if it can, whether O 39 is applicable to both criminal and civil proceedings.

We have heard the contention made by the appellant very ably put across by Mr Ronald Khoo. We stress however that central in his argument is the question of the applicability of O 39 to criminal proceedings. There were two other subsidiary points raised by Mr Khoo. As regards those, suffice to say that we need not deal with them as, in our view, they are without merits.

To turn now to what we call the central issue in this appeal, it is our view that there is primarily a need to fully appreciate the scope and effect of O 39 which reads:

> 1(1) The Court may, in any *cause* or matter where it appears necessary for the purposes of justice, make an order in Form 73 for the examination on oath before a Judge or the Registrar or some other person, at any place, of any person.

It is abundantly clear that the crucial word in that order is the word 'cause' which is defined in the Act, that is, a principal legislation. 'Cause' is defined to include 'any action, defendant, and *any criminal proceeding.*' Read in the light of the definition of the words 'in any cause' in O 39, the word 'cause' must necessarily be construed to include 'any criminal proceedings'. By so holding the question that necessarily arises for determination is the merit of the proposition that that order does not apply to a criminal proceeding.

It is our considered view that to constitute a valid rule which would encompass not only civil but criminal proceeding, such rule must be properly enacted in that it must be made in accordance with the pursuant to a clear and unambiguous enabling provision of law. We think s 16 is such law. As this section is so crucial for our consideration of this appeal it is important that we reproduce hereunder the relevant portion of s 16(a) which reads:

> Rules of court may be made for the following purposes:
>
> (a) for regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the High Court and the Supreme Court in all *causes and matters* whatsoever in or with respect *to which those* Courts have for the time being jurisdiction.

We have earlier adverted to the definition 'cause' but had not referred to another word 'matter' which may be of some relevance. However upon analysis we feel it would suffice for purposes of this appeal to omit reference to the definition of that word. By reason of s 16(a) of the Act the definition of the word 'cause' must necessarily be applicable to the rules of court made under the section. The same meaning must be assigned to the word 'cause' in O 39. So viewed O 39 should therefore be applicable not only in respect of civil but also criminal proceedings. By reason of the construction we have placed on O 39 its scope and effect, we are firmly of the view that considered in the light of s 16(a), O 39 must accordingly be held to be valid and properly enacted and that the order is applicable to both civil and criminal proceedings.

Proceeding on the basis that O 39 is applicable to criminal proceedings, the only remaining factor for the court to consider before making an order is to satisfy itself that such an order is necessary for purposes of justice. It is an exercise of the court's discretion depending on the circumstances of each case. In any event the point is not taken in this appeal and we say no more of it.

It has been suggested that at that stage when an application is made under O 39 the court shall have to consider the question of admissibility of the depositions. We hardly think so. Consideration affecting admissibility of a deposition of any particular person subject of the order within or outside jurisdiction does not appear to be a relevant consideration to precede the making of an order under O 39 r (1) or (2).

For the reasons we have stated it is our judgment that the learned judge had not erred in law in making the order which he did. In effect the learned judge had acted intra vires. Accordingly, the appeal must be dismissed. It is so ordered with costs.

Appeal dismissed.

Solicitors: *Shin Pang & Co.*

Reported by *Prof Ahmad Ibrahim*